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Consolidated Cases Nos. 04-1034, 04-1384

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IN THE

Supreme Court of the United States

JOHN A. RAPANOS, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

JUNE CARABELL, *et al.*,
Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF ENVIRONMENTAL LAW INSTITUTE AS AMICUS CURIAE SUPPORTING RESPONDENTS

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INTEREST OF AMICUS CURIAE

The Environmental Law Institute (ELI) is an independent, nonpartisan education and policy research center dedicated to environmental protection through improved environmental law and governance.[1] Over 3,000 environmental professionals from law firms, government, industry, public interest organizations, and academia support ELI through its Associates Program.

Founded in 1969, at the dawn of the modern era of environmental law, ELI has long been a leader in the areas of water quality and wetlands protection. ELI has undertaken extensive research (often at the request of the U.S. Environmental Protection Agency or the U.S. Army Corps of Engineers) to promote innovative and cost-effective legal and policy approaches. In particular, ELI has exhaustively studied and reported on aspects of the collaborative federal-state framework that governs wetlands conservation. Since 1979, ELI has published the *National Wetlands Newsletter*, now the preeminent journal on wetlands policy. ELI has actively participated in the implementation of the Clean Water Act since its enactment in 1972.

ELI has concluded from its long-standing involvement in wetlands law and policy that the current comprehensive federal program is absolutely essential to the health of our Nation's waters. Because of the profound threat these cases pose to the framework established by Congress to protect water resources nationwide, ELI for the first time in its 36-year history is participating in judicial proceedings as an *amicus curiae*.

STATEMENT OF THE CASE

In these consolidated cases, the U.S. Court of Appeals for the Sixth Circuit upheld federal Clean Water Act jurisdiction over (a) wetlands sharing a surface water connection

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[1] This brief was not authored in whole or in part by counsel for any party and no person or entity, other than *amicus* and its counsel, made any monetary contribution to its preparation or submission. Letters from the parties consenting to the filing of this brief are on file with the Clerk.

with tributaries of navigable-in-fact waterways[2] (*Rapanos*) and (b) wetlands separated from such tributaries only by a man-made berm (*Carabell*). Both cases involve "adjacent wetlands" under regulations promulgated by the U.S. Army Corps of Engineers (Corps) pursuant to Section 404 of the Clean Water Act (Act). Section 404 does not prohibit all filling of wetlands; rather, it requires that a permit be obtained prior to any filling, setting forth reasonable protection and mitigation measures. Permits are liberally granted by the Corps, and most smaller projects are permitted by rule rather than by individual applications.

The Sixth Circuit held in these cases that the Corps reasonably interpreted "waters of the United States" to encompass wetlands adjacent to tributaries of navigable-in-fact waters, including the wetlands that petitioners here proposed to fill. These decisions were based on the plain language, express purpose, and legislative history of the Clean Water Act as construed in the unanimous decision of this Court in *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) (*Riverside Bayview*). There, as in the cases below, "the Corps' ecological judgment about the relationship between waters and their adjacent wetlands" reflected a nexus sufficient to confer statutory jurisdiction to protect the adjacent wetlands. *Id.* at 134.

The Sixth Circuit's decisions also were in full accord with this Court's opinion in *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), which held that the Clean Water Act did not extend to abandoned gravel pits where the sole basis for jurisdiction was their use by migratory birds. *Id.* at 171-172. Unlike the isolated ponds addressed in *SWANCC*, the types of adjacent wetlands addressed in

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[2] *Amicus* uses the terms "navigable-in-fact" and "traditional navigable waters" to connote waters that are actually navigable or are susceptible to being so made. The term "navigable waters," as used in the Clean Water Act, is defined to mean "waters of the United States" and is a more comprehensive term of art that includes waters that are not navigable-in-fact. *See* 33 U.S.C. § 1362(7).

these cases have physical, biological, and chemical connections with navigable-in-fact waters that bring them within the "waters of the United States" covered by the Act. Because the statutory question is conclusively resolved under this Court's prior decision in *Riverside Bayview*, the primary issue of law presented in these cases is whether jurisdiction to protect adjacent wetlands is within the power granted to the federal government under the Commerce Clause of the U.S. Constitution.

SUMMARY OF ARGUMENT

I. Congress intended to include within "waters of the United States" those wetlands that have functional connections sufficient to affect the "chemical, physical, and biological integrity" of our Nation's waters. *See* 33 U.S.C. § 1251(a). As the Court held in *Riverside Bayview*, the Corps' regulations broadly interpreting "waters of the United States" to encompass adjacent wetlands were reasonable and were ratified by Congress in the 1977 Clean Water Act Amendments. 474 U.S. at 132-133, 137. The Court again should defer to the judgment of the Corps, which reasonably has determined that the categories of adjacent wetlands at issue here are within the scope of jurisdiction intended by Congress under the Act. Petitioners' arguments that Congress intended to limit jurisdiction only to wetlands abutting or directly flowing into traditional navigable waters conflict with Congress's express legislative purpose and with the Corps' administrative construction of the Act that Congress acquiesced to in 1977. *Id.* at 137.

SWANCC does not support a contrary conclusion. Unlike the isolated ponds in *SWANCC*, the Corps' jurisdiction over adjacent wetlands that have functional connections with traditional navigable waters is necessary to protect and maintain the chemical, physical, and biological integrity of the waters of the United States, as Congress mandated under the Act.

II. Congress has Commerce Clause authority to protect wetlands adjacent to navigable-in-fact waters and their tributaries. The power to protect navigability is a funda-

mental attribute of federal authority under the Commerce Clause, and adjacent wetlands provide critical flood-control functions that are vital to ensure continued navigability of our Nation's waters. *See, e.g., Oklahoma ex rel. Phillips* v. *Guy F. Atkinson, Co.*, 313 U.S. 508, 525 (1941). Commerce Clause authority over adjacent wetlands also is necessary to protect traditional navigable waters against pollution and similar injuries. Jurisdiction over wetlands that have a surface water connection through tributaries to navigable-in-fact waters (as the wetlands in *Rapanos* do) is plainly important to this end. Even where the hydrological connection may be altered by a man-made berm (as in *Carabell*), adjacent wetlands absorb water and sequester pollutants that would otherwise flow into tributaries and traditional navigable waters. Federal jurisdiction does not depend on a showing in each case that alteration or destruction of a particular wetland poses a threat to particular navigable-in-fact waters. Congress has the power to adopt, and to delegate to the Corps the power to adopt, rational rules giving the Corps the jurisdiction generally necessary to protect navigable waters. The Corps then may constitutionally assert such jurisdiction without a showing of a specific threat in each particular case.

Congress has constitutional power to regulate destruction and pollution of adjacent wetlands for the additional reason that these are economic activities that have substantial effects on interstate commerce. *See, e.g., Gonzales* v. *Raich*, 125 S. Ct. 2195 (2005). The Clean Water Act regulates economic activities, and the activities regulated in these cases—filling of wetlands for commercial development—are inherently economic. The *Rapanos* petitioners planned to construct a shopping center and build roads on the wetlands; the *Carabell* petitioners planned to construct a large, multi-family condominium development. It is manifestly rational to conclude that the pollution and destruction of wetlands resulting from these types of economic activities have substantial effects on interstate commerce. The issue is not whether these effects can be shown in each instance in which jurisdiction is asserted, but whether the class of ac-

tivities, rationally defined, has a substantial effect in the aggregate. Moreover, the Corps' "adjacent wetlands" regulation is a critical component of the Clean Water Act's comprehensive regulatory scheme that, if narrowed, would nullify Congress's purpose. *See Raich*, 125 S. Ct. at 2209.

III. Federal jurisdiction over adjacent wetlands is necessary to the federal-state framework that Congress has enacted and it is wholly consistent with principles of federalism. To address the national problem of protecting water resources, Congress determined that minimum federal standards and oversight are necessary. Congress provided for the States to play a primary role in implementing the federal wetlands program if they so choose. But Congress did not, as petitioners argue, *divide* jurisdiction between the federal and state governments based on the proximity of wetlands to navigable-in-fact water. Nor is there a basis for petitioners' arguments that wetlands protection is a form of land use regulation intruding on States' traditional powers. Historically, most States have not regulated wetlands, and in any case this Court has long upheld the primary role of the federal government in preserving environmental resources. Comprehensive federal jurisdiction here is wholly consistent with principles of federalism as articulated by our Nation's founders, who recognized that the federal government must be and is empowered to address problems that can only be solved at the national level.

ARGUMENT

Wetlands are critical to the health of traditional navigable waters and are of great value to the people who depend upon these waters for their livelihoods. Wetlands filter and purify water, absorb floodwaters, serve as storm buffers, provide habitat for economically valuable fish and riparian wildlife, and recharge groundwater supplies.

If the Clean Water Act is to remain effective, the jurisdictional definition of "waters of the United States" must be understood, as Congress intended, to include not only traditional navigable waters and their tributaries, but also the wetlands that protect and enhance them—whether those

wetlands directly abut such waters or otherwise have functional connections with them. Whereas wetlands were once viewed as "bogs" and "swamps" suitable only for draining or filling, improved scientific understanding of their ecological and economic value has informed Congress's determination that they must be protected under the Act. From the mid-1950s to the mid-1970s, an estimated 550,000 acres of wetlands were lost *per year* in the continental United States. The decade following passage of the Act saw this rate cut in half,[3] and as of 2001, the rate of loss stood at only 60,000 acres per year.[4]

Petitioners' arguments against federal jurisdiction in these cases would, if adopted by the Court, defeat Congress's intent in passing the Clean Water Act. Petitioners ask the Court to draw an arbitrary line for federal jurisdiction that would include only wetlands physically abutting or directly flowing into traditional navigable waters. Such a line would be ineffective and has no basis in the statute. It would exclude the vast majority of critically important wetlands from coverage under the Act—making them immediately vulnerable to destruction or pollution. Wetlands across the country could again be lost at an accelerated rate, leaving navigable waterways more polluted, rendering populations more susceptible to flooding, reducing the sustainability of economically valuable fisheries and wildlife, and potentially jeopardizing drinking water supplies.

Moreover, the jurisdictional provisions at issue in these cases are the foundation for all of the Clean Water Act programs, including the regulation of "point source" discharges of industrial pollution. If, as petitioners seek, this Court an-

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[3] Thomas E. Dahl & Gregory J. Allord, *History of Wetlands in the Conterminous United States*, United States Geological Survey Water Supply Paper 2425, *available at* http://water.usgs.gov/nwsum/WSP2425/history.html (last modified Mar. 7, 1997).

[4] United States Environmental Protection Agency, *Threats to Wetlands*, Office of Wetlands, Ocean & Watersheds, EPA 483-F-01-002d (Sept. 2001), *available at* http://www.epa.gov/owow/wetlands/pdf/threats.pdf.

nounces new limitations on the scope of the Act, essentially re-dividing jurisdiction between federal and state governments, it would become impossible to achieve the comprehensive restoration of our Nation's waters that Congress intended. And a holding by this Court that Congress is powerless under the Constitution to protect the wetlands in these cases would call into question the validity of other decades-old environmental laws, also enacted under Congress's Commerce Clause authority, that protect clean air, drinking water, endangered species, and other natural resources.[5] There is, however, no valid basis for any such holding, as we now explain.

I. "WATERS OF THE UNITED STATES" PROTECTED BY THE CLEAN WATER ACT INCLUDE ADJACENT WETLANDS WITH FUNCTIONAL CONNECTIONS TO TRADITIONAL NAVIGABLE WATERS

A. Scope And Purposes Of The Clean Water Act

Congress passed the Clean Water Act in 1972 to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Prior to 1970, responsibility for regulation of water pollution had largely been left to state and local authorities. *See Middlesex County Sewerage Auth.* v. *National Sea Clammers Ass'n*, 453 U.S. 1, 11 (1981). By 1972, however, water pollution had become a national crisis; the state-led system proved to be "ineffective," *id.*, and "inadequate in every vital aspect," S. Rep. No. 92-414 (1972), at 7, *reprinted in* 1972 U.S.C.C.A.N. 3668, 3674, *cited in Milwaukee* v. *Illinois*, 451 U.S. 304, 318 (1981). In response, Congress "establish[ed] an all-encompassing program of water pollution regulation," applicable to "virtually all bodies of water." *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 492 (1987) (citing *Milwaukee*, 451 U.S. 304). Congress recognized that protection of the integrity of aquatic ecosystems demanded broad fed-

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[5] *E.g.*, Clean Air Act, 42 U.S.C. §§ 7401-7671q; Safe Drinking Water Act, 42 U.S.C. §§ 300f to 300j-26; Endangered Species Act, 16 U.S.C. §§ 1531-1544.

eral authority to control pollution, stating: "Water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source." S. Rep. No. 92-414, at 77 (1972).

To this end, Congress redefined the phrase "navigable waters," which had been used in prior water pollution laws, to extend to all "waters of the United States," 33 U.S.C. § 1362(7). This redefinition reflected Congress's intent to include within federal jurisdiction some non-navigable waters. *See Riverside Bayview*, 474 U.S. at 133; *see also Natural Res. Def. Council* v. *Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975) (Congress intended to extend jurisdiction over the Nation's waters to "the maximum extent permissible under the Commerce Clause of the Constitution."). As this Court held in *Riverside Bayview* with respect to the same category of "adjacent wetlands" at issue here, Congress acquiesced in this expansive definition of federal jurisdiction when it passed extensive amendments to the Clean Water Act in 1977. 474 U.S. at 136-138.

Congress's intention to protect *all* U.S. waters—including wetlands—is properly reflected in the Corps' "adjacent wetlands" regulations. The Corps defines "waters of the United States" to include not only traditional navigable waters and their tributaries, *see e.g.*, 33 C.F.R. § 328.3(a)(1)-(4),(5), but also "[w]etlands adjacent to" any such waters, *id.* § 328.3(a)(7). The regulations clarify that federal jurisdiction is not defeated by the presence of obstructions that "separate" wetlands from otherwise adjacent waters: "The term adjacent means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'" *Id.* § 328.3(c). Petitioners do not seriously dispute that all the wetlands in these cases fall within the Corps' regulatory definition and thus require a Section 404 permit as long as the regulations themselves are valid.

The Corps does not, as petitioners contend, seek to regulate all aspects of the hydrological cycle. Petitioners and their *amici* attempt to portray the Corps as an over-

zealous agency run amok, but the facts demonstrate otherwise. Not only is the Corps' jurisdiction constrained by the regulatory definition of "waters of the United States," the Corps also exercises discretion through the Section 404 permitting process. Although the Corps received an average of 74,500 Section 404 permit requests each year from 1996 to 1999, a mere three-tenths of one percent (0.3%) were denied.[6] Thus, claims that the Corps overreaches under Section 404 are belied both by the regulatory limitations and, empirically, by the high percentage of permits the Corps grants.

B. The Adjacent Wetlands In These Cases Are "Waters Of The United States" Under *Riverside Bayview* And *SWANCC*

As this Court held in *Riverside Bayview*, the Corps acted pursuant to clear statutory authority in promulgating its "adjacent wetlands" regulations. 474 U.S. at 135. *Riverside Bayview* is controlling with respect to the statutory interpretation issues in these cases. Petitioners have not offered any basis in the statute to exclude their adjacent wetlands from federal protection. Like the adjacent wetlands in *Riverside Bayview*, the wetlands in these cases are functionally connected to navigable-in-fact waters or their tributaries and thus fall within the clear reach of the Clean Water Act.[7]

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[6] *See EPA's Clean Air Budget and the Corps of Engineers Wetlands Budget: Hearing Before the Subcomm. on Clean Air, Wetlands, Private Property, and Nuclear Safety of the Senate Comm. on Environment and Public Works*, 106th Cong., at 2 (2000) (testimony of Michael Davis, Deputy Assistant Secretary of the Army for Civil Works).

[7] Petitioners' *amici* claim these cases are really about "ditches," not wetlands and tributaries, and "point sources" rather than "waters of the United States," arguing that under the Corps' 1975 interim regulations wetlands connected to traditional navigable waters by conveyances such as ditches were not intended to be subject to federal protection. *See* Br. of Amici Curiae Foundation for Environmental and Economic Progress *et al.* in Support of Petitioners 21-22. However, the Corps' 1975 interim regulations did not use these terms in the obtuse manner urged by *amici*. To the contrary, those regulations provided that even wetlands *not* directly

This functional relationship corresponds with the purpose of the Act. Wetlands maintain the *physical integrity* of downstream waters by providing important flood control and storm buffer functions. For example, the substantial impacts of Hurricane Katrina on the navigable waters of Louisiana and Mississippi in August 2005 were due in part to the extensive loss of wetlands that has occurred on the Gulf Coast.[8] Adjacent wetlands also maintain the *chemical integrity* of downstream waters by filtering and removing excessive nutrients and other pollutants that today threaten the existence of major interstate ecosystems such as the Great Lakes and the Chesapeake Bay. Finally, wetlands, including adjacent wetlands, play a critical role in ensuring the *biological integrity* of downstream waters by supporting the growth of plants and animals that form the basis of the aquatic food chain and providing habitat for fish that spawn in wetlands and move to open waters later in life.[9]

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adjacent or contiguous to traditional navigable waters or their tributaries could come within the Corps' jurisdiction where necessary for the protection of water quality. 40 Fed. Reg. 31325 (codifying 33 C.F.R. § 209.120(d)(2)(i)). Read as a whole, the Corps' regulations offer no support for *amici's* narrow construction. There is no reason that a water may not be *both* a "point source" and a "water of the United States" under the Act. Moreover, Congress's intent to address *all* sources of pollution that impair navigable waters was reaffirmed in the Water Quality Act of 1987, which further amended the Clean Water Act and established a comprehensive program for regulating discharges of storm water run-off. *See* 33 U.S.C. § 1342(p).

[8] *See* Tim Hirsh, *Katrina Damage Blamed on Wetland Loss, available at* http://news.bbc.co.uk/2/hi/americas/4398852.stm (last updated Nov. 1, 2000).

[9] Indeed, given the critical importance of wetlands to downstream waters, every Administration since 1989 has adopted an express policy of "no net loss" of wetlands—a policy recently expanded to include an "overall increase" of wetlands on a national basis. *See, e.g., Fact Sheet: President Announces Wetlands Initiative on Earth Day* (2004), *available at* http://www.whitehouse.gov/news/releases/2004/04/20040422-1.html. This policy is implemented primarily through the § 404 permitting program. Comprehensive federal jurisdiction over wetlands as waters of the United States is absolutely essential to meet this national goal.

The broad scope of Clean Water Act jurisdiction over adjacent wetlands affirmed by the Court in *Riverside Bayview* was not affected by this Court's holding in *SWANCC*. There, the Court expressly recognized that waters are subject to federal jurisdiction where they have a "significant nexus" with traditional navigable waters, and that in 1977 Congress acquiesced in the Corps' broad authority over filling of adjacent wetlands as necessary to protect traditional navigable waters. 531 U.S. at 170-171 (citing *Riverside Bayview*, 474 U.S. at 136). *SWANCC* rejected the Corps' assertion of jurisdiction over an abandoned, water-filled mining site located wholly within Illinois where the only basis for jurisdiction was its use by migratory birds—because there was *no* connection with traditional navigable waters or their tributaries. Unlike the isolated ponds in *SWANCC*, the type of wetlands here have important functional connections to, and resulting impacts on, traditional navigable waters.

C. The Court Should Defer To The Corps' Interpretation

The Court established in *Riverside Bayview* that Congress intended, at a minimum, that jurisdiction under the Act cover wetlands abutting traditional navigable waters. 474 U.S. at 137. To the extent that any ambiguity remains about whether the Act reaches wetlands adjacent to *tributaries* of traditional navigable waters, this Court should defer to the Corps' interpretation of the Act, just as it did in *Riverside Bayview*. "An agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress." *Id.* at 131; *see Chevron U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984); *see also United States* v. *Mead Corp.*, 533 U.S. 218, 229 (2001) (it is "apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law").

The Corps' conclusion that wetlands adjacent to tributaries of navigable-in-fact waters and wetlands separated from such tributaries only by a man-made berm are jurisdictional is well supported and reasonable. As this Court noted in *Riverside Bayview*:

> [W]etlands that are not flooded by adjacent waters may still tend to drain into those waters. In such circumstances, the Corps has concluded that wetlands may serve to filter and purify water draining into adjacent bodies of water, *see* 33 C.F.R. § 320.4(b)(2)(vii) (1985), and to slow the flow of surface runoff into lakes, rivers, and streams and thus prevent flooding and erosion, *see* § 320.4(b)(2)(iv) and (v). In addition, adjacent wetlands may "serve significant natural biological functions, including food chain production, general habitat, and nesting, spawning, rearing and resting sites for aquatic . . . species." § 320.4(b)(2)(i).

474 U.S. at 134-135. Here, as in *Riverside Bayview*, it was reasonable for the Corps to conclude that the adjacent wetlands fall within the Act.[10]

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[10] The Court in *SWANCC* noted that the Corps' *original* regulations published in 1974 defined "navigable waters" narrowly, consistent with prior federal statutes. 531 U.S. at 168. However, there is evidence that the Corps may have intentionally construed Congress's intent in the Clean Water Act too narrowly. *See* Lance D. Wood, *Don't Be Misled: Clean Water Act Jurisdiction Extends to All Non-Navigable Tributaries of the Traditional Navigable Waters and to Their Adjacent Wetlands*, 34 ELR 10187, 10211-10212 (Feb. 2004) (attaching letter from counsel who represented the Corps in 1974, stating that at that time the Corps' decision makers and senior attorneys knew that Congress had intended jurisdiction under the Act to extend much further than the prior statutory definition of "navigable waters," but that they nevertheless reasserted the previous narrower scope for political reasons and with an understanding that the interpretation in all probability would be reversed in the courts as contrary to the intent of Congress, as in fact occurred in *Callaway*).

D. Petitioners' Proposed Interpretation Has No Support In The Statute And Could Nullify Congress's Comprehensive Design

The *Rapanos* petitioners and some *amici* argue that jurisdiction under Section 404 of the Act reaches no further than wetlands directly abutting traditional navigable waters. *See, e.g.*, Rapanos Br. 11. Petitioners point to nothing in the statute or its legislative history to support this argument. Indeed, one former Corps official has estimated that if the definition of "waters of the United States" were interpreted to embrace only traditional navigable waters and their abutting wetlands, the result would be to exclude from Clean Water Act coverage—and thus federal protection—more than 99% of the waters now understood to be covered by the Act. *See* Wood, *supra* n.10, at 10192-10193. Consequently, such a construction makes no sense, as it would fundamentally defeat the Act's core purpose of ensuring that federal jurisdiction is sufficient to successfully combat water pollution.

Moreover, the effect of this massive curtailment of federal jurisdiction would not be limited to the filling of wetlands. The restrictive definition advanced by petitioners also would gut the "point source" pollution-discharge prohibition under Section 402 of the Act and other important programs relating to water quality because the statutory terms material to this case are similarly critical throughout the Act. *See* 33 U.S.C. § 1342; *see also* 43 Op. Att'y Gen. 197, at 200-201 (Sept. 5, 1979) ("The term 'navigable waters' . . . is a linchpin of the Act. . . . Its definition is not specific to § 404, but is included among the Act's general provisions."). Thus, petitioners' proposed interpretation would immunize from federal regulation disposal of oil, chemicals, and other pollutants into the vast majority of our Nation's wetlands and waterways.

The *Carabell* petitioners advance an alternative interpretation conveniently suited to the particular facts of their case. They suggest that Congress intended to limit jurisdiction under the Act to wetlands that flow continuously into

waters that are navigable-in-fact. *See* Carabell Br. 19. But the Act simply does not include any such restrictions.

Petitioners' statutory arguments cannot be understood as a serious effort to discern the intent of Congress. Rather, they are a transparent attempt to have this Court reverse three decades of settled legislative policy. The Court should take this opportunity to make clear that the holding of *Riverside Bayview* controls when it comes to the Corps' jurisdiction over wetlands functionally connected to navigable-in-fact waters. The changes to the scope of the Clean Water Act advocated by petitioners must be sought from Congress, not the courts.

Finally, this Court should reject petitioners' argument that the Court must construe the scope of federal jurisdiction narrowly under the canon of constitutional avoidance. *See* Carabell Br. 31; Rapanos Br. 22. This doctrine arises "only when there are serious concerns about the statute's constitutionality." *Harris* v. *United States*, 536 U.S. 545, 555 (2002). As demonstrated in Part II below, the Corps' interpretation of the Clean Water Act to cover "adjacent wetlands" does not even come close to "invok[ing] the outer limits of Congress' power." *Cf. SWANCC*, 531 U.S. at 172 (citing *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)). Nor, as discussed in Part III below, does this interpretation "alter[] the federal-state framework by permitting federal encroachment upon a traditional state power." *Id.* (citing *United States* v. *Bass*, 404 U.S. 336, 349 (1971)).

II. CONGRESS HAS AUTHORITY TO PROTECT WETLANDS ADJACENT TO TRIBUTARIES OF TRADITIONAL NAVIGABLE WATERS

This Court has identified three general categories of regulation in which Congress may engage pursuant to its plenary power over interstate commerce: (1) regulation of the "channels of interstate commerce"; (2) regulation of "the instrumentalities of interstate commerce, and persons or things in interstate commerce"; and (3) regulation of "activities that substantially affect interstate commerce." *Gonzales* v. *Raich*, 125 S. Ct. 2195, 2205 (2005). Federal jurisdic-

tion over the "adjacent wetlands" in these cases fits comfortably within both the first and third categories.

A. Jurisdiction Over Wetlands Adjacent To Tributaries Of Traditional Navigable Waters Protects Channels Of Commerce

1. Adjacent Wetlands Provide Flood Control Functions Necessary To Navigability

It is well settled that "[t]he power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States." *Gilman* v. *City of Phila.*, 70 U.S. (3 Wall.) 713, 724-725 (1866) (citing *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824)). Congress has the power to "take *all needed measures* to preserve the navigability of the navigable water course of the country." *United States* v. *Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 703 (1899) (emphasis added). This power is not limited to the navigable portion of a waterway, but applies to any substantial threat to the navigable capacity "wherever done or however done." *Id.* at 708. "[C]ontrol over the non-navigable parts of a river may be essential or desirable in the interests of the navigable portions . . . ." *Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Co.*, 313 U.S. 508, 525 (1941). "Flood protection" along with "watershed development" are "parts of commerce control," and thus "the power of flood control extends to the tributaries of navigable streams." *Id.* (quoting *United States* v. *Appalachian Power Co.*, 311 U.S. 377, 426 (1940)).

Congress's authority to regulate filling of wetlands is supported by its "channels" power because wetlands play an important role in flood control that affects navigability downstream. A single acre of wetlands can store more than one million gallons of water.[11] That absorptive ability allows wetlands adjacent to tributaries of traditional navigable waters to intercept storm run-off and slowly release or evapo-

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[11] United States Environmental Protection Agency, *Functions and Values of Wetlands*, EPA 843-F-01-002c (Sept. 2001), *available at* http://www.epa.gov/owow/wetlands/pdf/fun_val.pdf.

rate water after peak flow has subsided, thereby regulating water levels and reducing downstream flood damage.[12] Freshwater wetlands, including forested wetlands, located along the upper parts of river systems are thought to play a particularly important role in flood prevention.[13]

Because non-navigable tributaries may comprise more than three-quarters of the total waterway length in a river network,[14] the functional contribution of wetlands adjacent to these tributaries is critically important to flood control. Moreover, since floodwaters can travel over or under berms and minor obstructions, wetlands directly adjacent to tributaries serve as effective storm-water buffers even when those wetlands do not have surface water connections with the water bodies that they are protecting.

Further, this Court has held that the extent to which a particular wetland will alleviate flood conditions does not bear on the constitutional analysis. *Atkinson*, 313 U.S. at 527. "[T]he decision as to what watersheds should be controlled (and what methods should be employed) in order to protect the various arteries of interstate commerce from the disasters of floods" is left to Congress, not the courts. *Id.* at 528.

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[12] *See* William J. Mitsch & James G. Gosselink, *Wetlands* 584 (2d ed. 2000) ("Because it is usually the peak flows that produce flood damage, the effect of the wetland area is to reduce the danger of flooding.").

[13] Paul F. Scodari, *Wetlands Protection: The Role of Economics* 21 (1990); Theda Braddock, *Wetlands: An Introduction to Ecology, the Law, and Permitting* (1995) ("[T]he presence of vegetation and forests in particular can enhance this function through the creation of great roughness or friction which can slow floodwater velocities.").

[14] *See* Judith L. Meyer et al., *Where Rivers Are Born: The Scientific Imperative for Defending Small Streams and Wetlands* 6-7 (2003), *available at* http://www.americanrivers.org/site/DocServer/WhereRiversAreBorn1.pdf.

2. Adjacent Wetlands Protect Traditional Navigable Waters From Pollution And Injurious Uses

Jurisdiction over adjacent wetlands also is necessary to protect our Nation's waters from pollution. In *United States* v. *Ashland Oil & Transportation Co.*, 504 F.2d 1317 (6th Cir. 1974), the Sixth Circuit noted that "water pollution is . . . a direct threat to navigation." *Id.* at 1325 (citing *Kernan* v. *American Dredging Co.*, 355 U.S. 426, 427 (1958)). Applying *Atkinson*, the court in *Ashland Oil* held that as "the power of flood control extends to the tributaries of navigable streams . . . the power of pollution control extends to the tributaries of navigable streams likewise." *Id.* at 1327 (internal quotation marks omitted).

This Court has cited with approval the holding in *Ashland Oil*. Addressing the constitutionality of the Surface Mining Act, which established national standards addressing environmental degradation caused by mining operations, the Court in *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n* "agree[d] with the lower federal courts that have uniformly found the power conferred by the Commerce Clause broad enough to permit congressional regulation of activities causing air or water pollution, or other environmental hazards that may have effects in more than one State." 452 U.S. 264, 282 (1981) (citing *e.g.*, *Ashland Oil*).

Based on this authority, all courts of appeal that have considered the matter have held that the Clean Water Act's prohibition of the discharge of pollutants and fill material into navigable-in-fact waters, their tributaries, and adjacent wetlands is authorized under Congress's "channels" power even if there is no effect on navigability. In *United States* v. *Deaton*, 332 F.3d 698 (4th Cir. 2003), which involved facts similar to those in *Rapanos*, a unanimous Fourth Circuit panel concluded that "Congress's authority over the channels of commerce is . . . broad enough to allow it to legislate, as it did in the Clean Water Act, to prevent the use of navigable waters for injurious purposes." *Id.* at 707 (quoting *Caminetti* v. *United States*, 242 U.S. 470, 491 (1917)).

In *United States* v. *Gerke Excavating, Inc.*, a unanimous Seventh Circuit panel agreed. Judge Posner observed that

"Congress may forbid the pollution of navigable waters even if the pollution has no effect on navigability." 412 F.3d 804, 807 (7th Cir. 2005). He continued, "it doesn't matter whether the objection to allowing the Gerkes of this world to dry out wetlands is that the effect may be to reduce water levels in navigable waterways to the point at which navigation would be affected or that the effect may be to increase the level of pollution in such waters by reducing the supply of unpolluted wetlands water." *Id.*

Because any pollutant or fill material discharged into a tributary of a navigable-in-fact waterway "has the potential to move downstream and degrade the quality of the navigable waters themselves," *Deaton*, 332 F.3d at 707, Congress's authority is broad enough to allow it to legislate—as it did in the Clean Water Act—to protect against pollution of navigable-in-fact waters by regulating functionally connected wetlands.[15] Regardless of whether pollution takes place in navigable-in-fact waters, or flows directly there from neighboring wetlands (*Riverside Bayview*), or flows there through tributaries of navigable-in-fact waters (*Rapanos*), water is water, and there is no *constitutional* distinction based on the nature or location of the discharge. Nor does the presence of a berm that arguably interrupts the downstream flow of water from adjacent wetlands (*Carabell*) affect Congress's power to protect traditional navigable waters by preserving the connected wetlands' essential role in ensuring flood control, maintaining proper nutrient levels, filtering sediments and pollutants, and providing habitat. Even where there is little or no downstream flow, adjacent

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[15] At a recent congressional hearing before the Subcommittee on Water Resources and Environment, Rep. Gilchrest described a dye experiment conducted by the Corps on the property at issue in *Deaton*: The Corps dropped a little dye in the drainage ditch adjacent to the property and learned that when it became soluble, it traveled all the way to the Wicomico River—a tidal basin of the Chesapeake Bay. *Inconsistent Regulation of Wetlands and Other Waters: Hearing Before the Subcomm. on Water Resources and Environment of the House Comm. on Transportation and Infrastructure*, 108th Cong., at 4 (2004).

wetlands still perform essential downstream functions that are threatened if the wetlands are lost to condominiums and shopping malls.

The Clean Water Act's "adjacent wetlands" jurisdictional framework survives constitutional scrutiny even if it may reach some instances where there is no demonstrated threat to the integrity of traditional navigable waters. Congress may, for example, prohibit the discharge of deleterious substances into wetlands adjacent to tributaries of navigable-in-fact waters without subjecting its regime to judicial review of the likelihood that each wetland has a significant effect on navigable waters. This is so for two reasons. First, small instances add up: "Congress . . . may decide that the aggregate effect of all the individual instances of discharge . . . justifies regulating each of them." *Deaton*, 332 F.3d at 707 (citing *Wickard* v. *Filburn*, 317 U.S. 111 (1942)). Second, Congress may draw rational lines to prevent harm, without requiring that every case be tested to see whether there is an instance of the harm threatened: "Where the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class," *Perez* v. *United States*, 402 U.S. 146, 154 (1971) (citations omitted). Thus, federal jurisdiction is not dependent on showing a particular threat in a particular case to particular navigable waters. Congress has the power to implement rational jurisdictional rules necessary to protect navigable waters, and the Corps may then constitutionally assert such jurisdiction without a showing of a specific threat in each individual case.

This Court in *Riverside Bayview* recognized as much when it noted that not every wetland that falls within the Corps' jurisdiction necessarily is an asset to navigable waters. If a given wetland is "in fact lacking in importance to the aquatic environment—or where its importance is outweighed by other values—the Corps may always allow development of the wetland for other uses simply by issuing a permit." 474 U.S. at 135 n.9. Though the scope of the threat to navigable-in-fact waters may be relevant to the Corps' permit decision, it does not bear on the determination of fed-

eral wetlands jurisdiction or on the constitutionality of Congress's regulatory regime to protect and preserve navigable channels of commerce.

B. Pollution And Destruction Of Wetlands Adjacent To Tributaries Of Traditional Navigable Waters Have Substantial Effects On Interstate Commerce

Federal jurisdiction over adjacent wetlands also falls within Congress's ability to regulate "purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce." *See Raich*, 125 S. Ct. at 2205. Federal power over local activities may be necessary and proper to Congress's regulation of interstate commerce. *Id.* at 2216 (Scalia, J., concurring).

"Judicial review in this area is influenced above all by the fact that the Commerce Clause is a grant of plenary authority to Congress. This power is 'complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution.'" *Hodel*, 452 U.S. at 276 (quoting *Gibbons*, 22 U.S. (9 Wheat.) at 196) (citations omitted). The key inquiry is whether there is a rational basis for Congress's determination that the class of activities substantially affects interstate commerce and whether the means that Congress employed are reasonably tailored to the objectives of the statute. *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 258 (1964). The Court will uphold a reasonably well-tailored regulation of economic activity under the Commerce Clause unless it "is clear that there is no rational basis" for a determination that the regulated activity substantially affects interstate commerce. *FERC* v. *Mississippi*, 456 U.S. 742, 753-754 (1982).

1. The Clean Water Act Regulates Economic Activity Like The Activities Here

The activities regulated under the Clean Water Act are obviously and overwhelmingly economic in nature. Discharges of pollutants into surface waters occur primarily as a result of industrial and commercial operations, including manufacturing, construction, resource extraction, land development, agriculture, and waste disposal. *See, e.g.*, 40

C.F.R. pts. 403-610 (listing CWA effluent guidelines for 73 categories of industrial activities, which fill over 1500 pages of the Code of Federal Regulations). Similarly, dredging and filling of wetlands regulated under Section 404 are costly activities that are undertaken by commercial interests for monetary gain. *See* Thomas E. Dahl, *Status and Trends of Wetlands in the Conterminous United States 1986 to 1997*, at 12 (2000).

The facts here demonstrate the inherently economic nature of the activities regulated under the Act. Through their development corporation, the *Carabell* petitioners sought to drain a wetland in order to build their proposed 112-unit multi-building condominium complex. The *Rapanos* petitioners and their various corporations had to level the ground and dump sand into numerous wetlands in order to build their roads and shopping center. The wetlands at issue in both cases were owned by corporate entities seeking profit for their shareholders, not by individuals with non-economic intentions. The proposed destruction of wetlands in these cases represented substantial and integral steps in petitioners' construction projects and, as such, constituted economic activities for Commerce Clause purposes.

2. Pollution And Destruction Of Adjacent Wetlands Have Substantial Effects On Interstate Commerce

In *Hodel*, the Court upheld Congress's Commerce Clause authority to regulate local surface mining activities because of the cumulative effects on interstate commerce of "destroying or diminishing the utility of land for commercial, industrial, residential, recreational, agricultural, and forestry purposes, by causing erosion and landslides, by contributing to floods, by polluting the water, by destroying fish and wildlife habitats, by impairing natural beauty, by damaging the property of citizens, by creating hazards dangerous to life and property by degrading the quality of life in local communities, and by counteracting governmental programs and efforts to conserve soil, water, and other natural resources." 452 U.S. at 277. As was true of the intrastate

surface mining activities in *Hodel*, the discharge of pollutants or other fill material into wetlands adjacent to tributaries of traditional navigable waters impairs or eliminates a number of valuable ecological functions, leading to the same environmental harms and associated burdens on interstate commerce. These wetland functions include:

(a) *Flood Control.* The flood-control function of wetlands has significant impacts on the economy.[16] In a 1978 study, the Corps estimated that wetlands provided 75% of the natural water storage in the Charles River watershed and that loss of the flood-control function of these wetlands would lead to $18 million in flood damage per year.[17] The loss of flood-control services can have tremendous economic consequences. Floods killed 835 people and caused approximately $41.5 billion worth of damage between 1994 and 2003.[18] The 1993 Midwest flood, which was exacerbated by the loss of wetlands in the Mississippi River watershed, killed 70 people and destroyed approximately $18 billion in homes, businesses, and crops.[19]

(b) *Pollutant and Nutrient Removal.* Wetlands remove pollutants—including toxic chemicals, sediments, and harmful levels of nutrients like nitrogen and phosphorus—from waters of the United States. *See* United States Dep't

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[16] According to the Corps' evaluation of the Carabell proposal: "Wetlands located on the parcel likely provide floodwater storage due to the fact that the site contains clay soils and the parcel appears to be a depressional area." United States Army Corps of Engineers, Department of the Army Permit Evaluation, File No. 99-250-002-1, at 6-7 (C.A.J.A. 107-108).

[17] Francis R. Thibodeau & Bart D. Ostro, *An Economic Analysis of Wetlands Protection*, J. Envtl. Mgmt. 19, 22 (1981); *see also* 123 Cong. Rec. 38994 (1977) (Statement of Rep. Lehman) (noting that wetlands provide $140 billion worth of flood control and water purification services).

[18] United States Army Corps of Engineers, *Annual Flood Damage Report to Congress for Fiscal Year 2003*, tables 4 & 5 (June 2003), *available at* http://www.usace.army.mil/inet/functions/cw/cecwe/flood2003/.

[19] Brett Hulsey & Geoff Tichenor, *A Call for Flood Security Through Wetland Protection*, National Wetlands Newsletter 3-4 (May-June 2000).

of Agric., Econ. Res. Serv., *"Dead Zone" in the Gulf: Addressing Agriculture's Contribution*, Amber Waves 8 (Nov. 2003) (USDA, Amber Waves). Pollutant removal generally occurs in two stages: filtration and withdrawal. Office of Technology Assessment, *Wetlands: Their Use and Regulation* 48 (1984) (OTA). Filtration occurs as pollutants precipitate out of the slow-moving waters in the wetlands. Withdrawal occurs either when those pollutants are bound up in the wetlands' biomass (*i.e.*, plant matter) and substrate or when complex biochemical processes in the wetlands convert the chemical compounds into ecologically inert forms. *See* Scodari, *supra* n.13, at 14. While all wetlands serve as nutrient and sediment traps to some degree, those with fine, anoxic sediments, such as the forested wetlands in these cases, are particularly well suited to storing and removing nutrients. *Id.* In the absence of wetlands, increased levels of agricultural run-off and other pollutant-saturated wastewater make their way directly into tributaries and then into other economically valuable waters of the United States.

The effects of nutrient pollution can be devastating. A number of significant commercial fishing grounds, including the Gulf of Mexico and the Chesapeake Bay, currently suffer from a condition of depleted oxygen content known as "hypoxia" due to elevated levels of nitrogen, phosphorus, and other nutrients in the rivers that flow into these water bodies. The hypoxic zone in the Gulf of Mexico doubled in size, to 18,000 square kilometers, after the 1993 Midwest Floods.[20] Hypoxia reduces biological productivity and leads to fish kills, creating expansive areas of water known as "dead zones" that are essentially devoid of life. *See* USDA, Amber Waves 8. The loss of productivity in the Chesapeake Bay, Gulf of Mexico and other key fishing grounds that are currently suffering from nutrient pollution would have significant impacts on the national economy. According to the De-

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[20] National Centers for Coastal Ocean Science, *Hypoxia in the Gulf of Mexico, at* http://oceanservice.noaa.gov/products/pubs_hypox.html (last visited Jan. 11, 2006).

partment of Commerce, Americans spent over $61.9 billion on seafood products in 2004. National Marine Fisheries Service, *Fisheries of the United States: 2004* (2005); *see also* National Academy of Sciences, *Clean Coastal Waters: Understanding and Reducing the Effects of Nutrient Pollution* 111 (2000) (reporting the results of a study that found that restoring 100,000 acres of wetlands in the Mississippi River basin would provide an economic benefit of between $11.8 and $40 billion based on increases in water quality).[21]

Finally, wetlands adjacent to tributaries play a key role in filtering out sediments that would otherwise harm traditional navigable waters. These wetlands may remove up to 80% of suspended sediments from the water that flows through them.[22] Sedimentation is a major threat to commercially-important fish species such as salmon, which spawn in freshwater streams and need clean water to ensure that their eggs receive enough oxygen to survive.

(c) *Fisheries and Other Wildlife Habitat Support.* Adjacent wetlands also serve habitat needs of economically significant wildlife species. Wetlands are more effective producers and exporters of useful nutrients than terrestrial systems. Scodari, *supra* n.13, at 15. Forested wetlands such as those at issue here can produce 7-14 metric tons of biomass per hectare each year. OTA, *supra* p. 23, at 59. As this material decomposes, it supports the growth of the invertebrate populations that form the basis of the aquatic food chain. *Id.* at 58. Thus, elimination of this source of natural material, either through development of the wetland or the

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[21] These commercial impacts extend beyond fisheries. One study recently estimated that the boating, recreational fishing, and swimming benefits resulting from the decrease in nutrient loading as a consequence of Clean Water Act regulation were between $357.9 million and $1.8 billion. Cynthia Morgan & Nicole Owens, *Benefits of Water Quality Policies: The Chesapeake Bay*, 39 Ecological Econ. 271, 274 (2001).

[22] John F. Elder & Gerald L. Goddard, *Sediment and Nutrient Trapping Efficiency of a Constructed Wetland Near Delavan Lake, Wisconsin, 1993-1995, available at* http://wi.water.usgs.gov/pubs/FS-232-96/FS_232-96.pdf.

severing of the surface water connection between the wetland and surrounding waters, deprives the wildlife population of an important food source. Moreover, numerous species of commercial and sport fish, including pike and largemouth bass, rely on temporarily flooded freshwater wetlands for spawning grounds. *Id.* at 56. In addition to the $61.9 billion in commercial seafood consumption noted above, Americans spent $35.6 billion on recreational fishing in 2001. U.S. Fish & Wildlife Service, *2001 National Survey of Fishing, Hunting & Wildlife-Associated Recreation* 4 (2002). More generally, approximately 82 million U.S. residents participated in wildlife-related activities in 2001, with expenditures related to such activities totaling $108 billion. *Id.*

While the loss of functions associated with any particular wetland alone might not significantly affect commerce, it is sufficient that Congress had a rational basis for concluding that the aggregate commercial impacts stemming from impairment of these wetland functions, including flood control, pollutant filtration, and habitat support, would have such an impact. *See Raich*, 125 S. Ct. at 2207-2209; *Wickard*, 317 U.S. at 127-128; *see also Perez*, 402 U.S. at 154. Given the key role that wetlands play in ensuring the health and integrity of the waters of the United States and the importance of these waters to the national economy, Congress plainly could have rationally concluded that the loss of wetlands currently subject to federal jurisdiction would have a substantial effect indeed on interstate commerce.

3. Protection Of Adjacent Wetlands Is Necessary To The Clean Water Act's Regulatory Scheme

Federal authority under the Commerce Clause to regulate intrastate activity also is appropriate where it is an essential part of a larger regulatory scheme. *Raich*, 125 S. Ct. at 2207. A comprehensive regulatory program such as the Clean Water Act can be upheld without a specific showing that every facet of the program is independently and directly related to a valid congressional goal if the scheme as a whole is valid and the challenged provision is an integral part of that scheme. *See Hodel* v. *Indiana*, 452 U.S. 314, 329

n.17 (1981). This Court recently upheld a federal ban on intrastate possession of marijuana to avoid creating a "gaping hole" in the comprehensive federal drug control scheme. *Raich*, 125 U.S. at 2209. Because pollutants can harm the integrity of a water network regardless of whether they enter that network through a large interstate river or a small intrastate tributary, this Court should uphold the Corps' regulation of wetlands adjacent to tributaries of traditional navigable waters to avoid creating a similar hole in Congress's comprehensive scheme to combat water pollution.

III. Jurisdiction To Protect Adjacent Wetlands Is Necessary To The Federal-State Framework Created By Congress And Consistent With Principles Of Federalism

Petitioners and their *amici* argue that affirming federal jurisdiction in these cases would violate principles of federalism and undermine the role of the States in protecting water resources. They advance various proposed "tests" for jurisdiction, supposedly in defense of the prerogatives of the States, by which they are effectively asking this Court to divide jurisdiction over wetlands protection between the federal government and the States. But the division of jurisdiction proposed by petitioners' *amici* would directly conflict with Congress's stated intention to create a comprehensive federal program of water protection. *See International Paper Co.* v. *Ouellette*, 479 U.S. 481, 486 (1987).

A. Congress Provided For State Regulation

In the context of this comprehensive federal program, Congress chose "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter." *SWANCC*, 531 U.S. at 166-167 (quoting 33 U.S.C. § 1251(b)). All States, including those that lack independent wetlands laws, have authority under Section 401 of the Act to participate in the federal wetlands permitting process to ensure

that permit decisions are consistent with each State's water quality standards. 33 U.S.C. § 1341.

In addition, Section 404(g) of the Act authorizes a State to apply to the EPA for permission "to administer its own individual and general permit program for the discharge of dredged or fill material" into certain navigable waters. By incorporating Section 404(g) into the Act, Congress "opted . . . for a scheme that encouraged States to supplant federal control with their own regulatory programs." 513 U.S. at 192 (Stevens, J., dissenting).[23] But to attain the national goal of restoring the integrity of navigable waters, Congress determined that where States assumed the lead, States would implement and enforce standards no less stringent than the federal rules. This cooperative federal-state framework mandated by Congress necessarily depends on federal jurisdiction over all waters of the United States. Absent such jurisdiction, the statutory provision permitting States to assume primacy would be rendered meaningless with respect to vast tracts of critically important wetlands, and Congress's goal of consistent national protection would be defeated.

Thus, petitioners' reliance on the Act's preamble (33 U.S.C. § 1251(b)), to argue that the States are "primary," is wholly misplaced. The Act was not intended to *limit* the overarching comprehensive nature of the federal program, but rather to ensure that States could play a primary role *within* that program if they so elected. *See* S. Rep. No. 92-414 (explaining that "[a] significant aspect of the entire bill is the emphasis placed on development of a cooperative state-federal approach toward environmental enhancement" while noting that the federal government retains ultimate control for setting certain water pollution control standards); *New*

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[23] This integrated system of environmental regulations has state and federal components. *See, e.g.*, 33 U.S.C. § 1251(g) ("Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.").

York v. *United States*, 505 U.S. 144, 167 (1992) (describing legal framework of "cooperative federalism").

B. Wetlands Protection Does Not Impair Traditional State Functions

Petitioners repeatedly describe federal wetlands protection as "land use regulation" and argue that it usurps traditional state powers in this area. *E.g.*, Rapanos Br. 29; Carabell Br. 45. But that label has no basis in fact. Destruction of wetlands and the related threats to downstream waters have never been principal subjects of land use law. *See California Coastal Comm'n* v. *Granite Rock Co.*, 480 U.S. 572, 587 (1987); *see also Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204 (1999) (observing that traditional State authority to regulate natural resources must be shared when the federal government exercises one of its enumerated powers). Indeed, prior to 1970, most states did not regulate wetlands impacts, *see* Jon A. Kusler et al., *State Wetland Regulation: Status of Programs and Emerging Trends* 1 (Ass'n of State Wetland Managers 1994), and the losses, as noted above, were massive.

Moreover, incidental impacts on local authority do not defeat federal jurisdiction. "This Court has upheld as constitutional any number of federal statutes enacted under the commerce power that preempt particular exercises of state police power." *Hodel*, 452 U.S. at 292 (citations omitted) (rejecting contention that mining regulations impermissibly interfered with traditional state land use powers). To argue that federal wetlands protections should be invalidated because they intrude on States' traditional regulation of land use is similar to arguing that federal civil rights legislation should be invalidated because States traditionally regulated employment and business operations. The fact that a federal program, addressing quintessentially national problems, may indirectly affect traditional state functions is not a proper reason to disable the federal government from acting.

C. Federal Authority Is Necessary To Address This National Problem

A core objective of the Framers in 1787 was to empower the federal government to address problems national in scope that the individual States were incapable of solving themselves. The sixth Virginia Resolution, approved by the Constitutional Convention on July 17, 1787, highlighted this principle that "the national legislature ought to possess the legislative rights vested in Congress by the confederation; and moreover, to legislate in all cases for the general interests of the union, and also in those to which the States are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation." Notes of Debates in the Federal Convention of 1787, 380 (W.W. Norton & Co. ed., 1966). This fundamental principle—that the federal government must be able to legislate to solve national problems, particularly where the States are unable to do so themselves—is just as important to the principles of federalism as the reservation to States of their traditional police powers.

Clean water and healthy wetlands benefit the entire Nation, and only a federal program with uniform standards can maintain these wetlands and protect adjacent waters. *See generally* Oliver A. Houck & Michael Rolland, *Federalism in Wetlands Regulation: A Consideration of Delegation of Clean Water Act Section 404 and Related Programs to the States*, 54 Md. L. Rev. 1242, 1252-1253 (1995). The inherent economic incentives favoring development in a purely state-by-state framework further highlight the importance of retaining federal jurisdiction over adjacent wetlands. The benefits from development flow to individual States, while many of the costs of wetlands loss are widely dispersed. *See SWANCC*, 531 U.S. at 195 (Stevens, J., dissenting); *see also Gerke*, 412 F.3d at 807 (rejecting federalism argument as "two-edged" for "[t]he more extensive the wetlands, the greater their potential importance as a source of water to keep the navigable waterways full and clean"). Thus, the local costs and benefits of development should be weighed against national costs and benefits; in the absence of this

kind of national calculus, the interests of downstream States are unlikely to be adequately considered.

Congress has traditionally enjoyed the Commerce Clause power to prevent the "destructive interstate competition" that arises where different States offer uneven levels of environmental protection. *See Hodel*, 452 U.S. at 282 (upholding congressional finding that nationwide surface mining and reclamation standards are essential to ensure that interstate competition does not undermine the ability of individual States to maintain adequate standards within their borders). In the context of wetlands regulation, "[i]f [development] pressures are to be tempered in favor of wetlands preservation, there are good reasons for this regulation to be federal, reasons that drove enactment of the Clean Water Act and section 404 in the first place.... [U]neven regulation among the states tended to penalize those that safeguarded the national interest and to favor a 'race to the bottom' towards maximum development." Houck & Rolland, *supra* p. 29, at 1310.

Finally, the federal-state partnership that resulted in the implementation of the Clean Water Act has been highly effective in achieving the objectives set by Congress. Over more than three decades, the law has delivered dramatic reductions in pollution and stronger protection of wetlands resources of great value to the American people. Congress's achievement in fashioning this framework, and the performance of both the federal and state governments in making the Act work, have been a signal success. The vital federal role in the preservation of water resources intended by Congress in the Clean Water Act should be upheld by the Court.

CONCLUSION

For the foregoing reasons, the judgments of the court of appeals should be affirmed.

Respectfully submitted,

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